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No. 89-1966

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1989

RICHARD A BANKS,
Petitioner, Plaintiff

vs.

H. LAWRENCE GARRETT, III,
Secretary of the Navy,
Respondent, Defendant.

AMICUS CURIAE BRIEF IN SUPPORT OF THE GRANTING OF PETITIONER-PLAINTIFF'S PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMICUS CURIAE BRIEF

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QUESTION PRESENTED FOR REVIEW OF INTEREST TO AMICUS CURIAE

Without distracting from Petitioner's Questions Presented For Review, the Government Accountability Project believes that the facts of this case focus with unusual clarity the incongruity of the Military Necessity Doctrine, which the majority of the Supreme Court applied in the Goldman v. Weinberger, 475 U.S. 503 (1986), with First Amendment and statutory rights of members of the Armed Forces to communicate directly with members of Congress. Here the Goldman Military Necessity Doctrine was relied on by the District Court and Court of Appeals to defer to the judgment of the military, specifically to sustain the interest of the Department of the Navy to speak with the single voice to Congress. But, this interest is not peculiarly military. Goldman leaves unanswered: Where,

if anywhere, this Court will stop being more deferential in its review of military regulations challenged on First Amendment grounds than it is for Constitutional review of similar laws or regulations designed for civilian society? To the Government Accountability Project this question cries out for answer, it is directly raised by the instant case, and the Military Necessity Doctrine is overdue for reassessment.

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INTEREST OF AMICUS CURIAE

The Government Accountability Project is a non-profit, non-partisan, public interest organization founded in 1977 to support public employees and corporate workers who seek to prevent waste, corruption, and threats to public health and safety.

The Petitioner, Richard A. Banks, was subjected to what we recognize as typical of actions taken against Government Whistleblowers. These retributions against Whistleblowers are almost certain to escape close scrutiny if carried out by the military officials because they are shielded by the Military Necessity Doctrine, a doctrine that insulates the military from effective judicial review for violating the Constitutional rights of members of the Armed Forces.

Make no mistake about it, the Military Necessity Doctrine has already substantially

chilled First Amendment expression and inclinations to inform Congress of waste, abuse and fraud by members of the Armed Forces. It sends a legitimatizing message to those military officials prone to suppress individuality of service personnel even to the point that in documented cases members of the Armed Forces have been incarcerated in mental institutions without reason other than their exposures of waste, fraud and abuse in the Armed Forces.

The question of when, if ever, the judiciary is prepared to defend the liberties of Americans who serve their country in the Armed Forces deserves an answer.

The Military Necessity Doctrine leads to inefficient micromanagement at the Congressional level. Even then, such micromanagement is often foiled by the Military Necessity Doctrine, which requires lower courts to interpret military

regulations broadly while at the same time requiring them to construe conflicting statutes in a restrictive manner -- all quite different than how statutes and regulations that govern other public agencies are interpreted.

As exemplified by this case, the doctrine is even used to inhibit communications to members of Congress which, per se, impedes Congress in performing its function to regulate the Military.

In the instant case, the decisions of the lower courts were unquestionably premised on the Military Necessity Doctrine as expounded by the majority in Goldman. This doctrine, in our judgment, conflicts with the public interest. Because of our institutional interest to protect that public interest, we urge this Honorable Court to grant the Petition for Writ for Certiorari.

STATEMENT OF THE CASE

Commander Banks, as a Reserve Officer, was in command of a Naval Reserve Air Squadron scheduled to receive new F/A-18 Aircraft. Considerable time, effort, money were expended and permanent changes of station for personnel occurred incident thereto. However, when the transition was almost complete Commander Banks heard rumors that his Squadron would not receive the new aircraft. Upon checking, he learned that considerable political pressure was being brought to bear by active duty Navy pilots, via a Congressional staffer, on the Secretary of Navy to abort the planned transfer of new aircraft to Commander Banks' Squadron.

To learn what he could do, Commander Banks consulted with his own superiors, with a retired Rear Admiral who had been Chief of Naval Reserve and who recommended writing letters to members of Congress, and with the

Naval Reserve Association. The latter informed him that he could write members of Congress about the matter and in doing so could use his rank and position. He obtained a copy of 10 U.S.C. 1034, which provided no person may restrict any member of an Armed Force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessity to security of the United States.
Contrary to the facts in Goldman, he had no intention of violating any law or regulation.

Commander Banks, in fact, did not see or sign letters prepared for him to members of Congress. Nevertheless, he has taken full responsibility for the use of official Squadron letterhead, with his name signed by others as Commanding Officer, in about twelve to fifteen identical letters sent to members of Congress.

A well known tactic for dealing

Whistleblowers is to remove them from their jobs as soon as possible on almost any pretext. Here, it was decided that Commander Banks had violated Navy Regulations, Article 1149, Communications to the Congress, by using official letterhead in his letters to Congress. This is so although there was an extensive investigation by the Navy Intelligence Service concerning Commander Banks' letters to members of Congress. The superior officer who removed Commander Banks from his position as Squadron Commanding Officer stated in writing his action "was based solely on his [Commander Banks'] disregard for Navy Regulation Article 1149." The same officer also stated that until such time, "he performed his duties as Commanding Officer in an outstanding manner."

Thus to justify Banks' removal as Squadron Commanding Officer, the lower courts had to construe Article 1149 broader than its

language otherwise warranted particularly in view of the immediately prior Article 1148, which is a repetition of 10 U.S.C. 1034. There is nothing in such Article 1148 (or 10 U.S.C. 1034 from which it was copied) to suggest that a member of the Armed Forces who communicates with a member of Congress on official letterhead stationery thereby forfeits the protection of that Article and the identical Statute.

In other words, the lower courts, in applying the Military Necessity Doctrine of Goldman v. Weinberger, 475 U.S. 503 (1986) construed a regulation broadly and a conflicting statute narrowly. They also simply ignored 5 U.S.C. 2105(d) which provides that a reserve of the Armed Forces not on active duty, which was Banks' status, is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in

connection with the United States because of his appointment, oath or status, or any duties or functions performed or pay or allowances received in that capacity.

SUMMARY OF THE ARGUMENT

The purpose of this Amicus Curiae Brief is to persuade the Court to grant the Petition for Writ Certiorari. If such Writ is granted, it is the intention of the Government Accountability Project to file a further, more comprehensive Brief. We consider it particularly essential that the Congressional mandate of the Military Whistleblower Protection Act (Public Law 100-456, 102 Stat. 2024, 10 U.S.C.A. 1034 (1990)) to protect free flow of information from military service members to Congress be implemented without the threat of dilution premised on the Military Necessity Doctrine.

In the following argument, we also

outline briefly the basis for the Military Necessity Doctrine, practical problems it is causing by suppressing the First Amendment rights of those in military who might otherwise report waste, fraud and abuse, and that the doctrine as expressed in Goldman has been widely criticized.

ARGUMENT

Most judicial holdings relating to the Constitutional rights of service personnel focus on the First Amendment issues.

For non-military cases, this Court has substantially foreclosed Government disciplining of federal employees for the exercise of First Amendment rights. Unless the harm to Government interest is sufficiently serious to override values protected by the First Amendment, the Government cannot take adverse actions against those who exercise their First

Amendment Rights. Connick v. Myers, 461 U.S. 138 (1983) and Pickering v. Board of Education, 391 U.S. 563 (1968).

In contrast, for the military, with Orloff v. Willoughby, 345 U.S. 83 (1953), being an often cited leading case, this Court has consistently held that the military can restrict Constitutional rights of its members. The Court's reasoning is that the military constitutes a specialized community which may be governed by a different set of rules than for civilians. It was therefore considered necessary that the judiciary scrupulously avoid intervening in legitimate military matters, whereas the military should be scrupulous to avoid intervening in legitimate judicial matters. The principles of Orloff were reiterated in Parker v. Levy, 417 U.S. 733 (1974). In Parker, it was held that the necessity for maintaining obedience and discipline is fundamental to the

functioning of the Armed Forces and Army Regulations restricting free speech were not facially invalid for constraining First Amendment rights.

Aside for the requirement to ensure the military is always capable of performing its mission promptly and reliably, and therefore must insist upon a respect for duty and discipline without counterpart in civilian life, a second basis for the Military Necessity Doctrine is judicial deference to Congress. Congress has the power To make Rules for the Government and Regulation of the land and naval Forces pursuant to Article I, Section 8, Clause 14. Because of this Constitutional provision, judicial deference was held "at its apogee when legislative action under the Congressional authority to raise and support Armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S.

57, 70 (1981).

This Court in Brown v. Glines, 444 U.S. 348 (1980) and Secretary of the Navy v. Huff, 444 U.S. 453, (1980) upheld regulations requiring service members to obtain approval from base commanders before circulating petitions on or around the base. In both cases, plaintiffs claimed the regulations were in violation of 10 U.S.C. 1034 which prohibits the Armed Forces from preventing servicemen from communicating with members of Congress. In Huff, this Court said that such statutes must be construed to avoid limiting a base commander's authority any more than the legislative purpose requires.

The standard of review for military decisionmaking that results from the above cases is essentially that the military can circumvent rights and freedoms granted by the First Amendment by an assertion of "Military Necessity". No link between the restricted

right and the claimed military need is required. The Armed Service involved need not show how exercise of the right in question threatens any aspect of military order. ARIZONA LAW REVIEW, Vol. 30, p 354.

The situation is "Catch-22". This Court has, in effect, said to the military that if you leave us alone we will leave you alone, and to Congress that governing the military is your responsibility, but we will construe any laws which Congress passes to regulate the military as narrowly as their purposes allow to avoid conflicts with any regulations prescribed by the military.

As this case demonstrates, even regulations that inhibit communications to members of Congress will be given judicial deference, thus handicapping Congress to carry out the very function used as a basis for the Military Necessity Doctrine.

In April of 1986, Mr. Robert M. O'Neil,

president of the University of Virginia, delivered The Tenth Charles L. Decker Lecture in Administrative and Civil Law at the Army Judge Advocate General's School. His lecture is reported in the MILITARY LAW REVIEW, Volume 113, Summer of 1986, commencing on page 31. Mr. O'Neil expressed particular sympathy with Justice O'Connor's view. Her view was also considered in the ARIZONA LAW REVIEW, Vol. 30, at 358, as arguably the most workable standard. It would require the Government to satisfy a two prong test before restricting Constitutional rights of military personnel: First an extremely important military interest must be at stake; Second, the Government must show the asserted military interest will be significantly harmed by granting the requested exemption.

Mr. O'Neil thought the matter would soon be rendered moot by legislation. But, two years later in the MILITARY LAW REVIEW, Vol.

121, Summer 1988, First Lieutenant Dwight H. Sullivan's Article, p. 125, The Congressional Response to Goldman v. Weinberger, informs us that although Goldman was subject to considerable criticism, the greatest objection being its extreme deference to the military, corrective legislation did not occur despite attempts until in the 1988 Defense Authorization Bill. That legislation, once enacted, established a modest, reasonable, and functional boundary between military necessity and an important First Amendment right of military service members. The decisions below potentially threaten that statutory boundary.

The experience of the Government Accountability Project has been that many significant problems within the military are raised by Whistleblowers. Almost all Whistleblowers are harassed to a greater or lesser extent. Some are placed in the locked

wards of Military hospitals as mental cases for no other reason. This is specifically documented in Whistleblower Protection in the Military, Hearing Before the Acquisition Policy Panel of the Armed Services of the Committee on Armed Services, House of Representatives, H.A.S.C. No. 100-42, November 1987, and generally in the earlier Committee Print, The Whistleblowers, a Report on Federal Employees who Disclose Acts of Government Waste, Abuse and Corruption, prepared for the Committee on Government Affairs, the United States Senate, February 19, 1978.

The Military Necessity Doctrine, as a practical matter, condones a consistent pattern of reprisals against those in the Armed Forces who disclose waste, abuse and corruption. The treatment accorded to dedicated Americans, such as Banks, who have the courage to speak up sends a very real

message that effectively restrains many more who are otherwise motivated to do so. As a result the public and Congress hear mostly only what the military want them to hear. Whether or not this information is true, a free flow of information of the type protected by the First Amendment from military personnel to members of Congress is almost non-existent. The Military Necessity Doctrine may not be the cause of the problem for it also arises in other government bureaucracies. But there is amply reason to conclude that the doctrine is seriously flawed, that it contributes to the problem and the Banks petition provides an unparalleled opportunity for this Court to revise the doctrine along more sensible lines or to abandon it altogether.

CONCLUSION

The Banks' case involves First Amendment

rights expressed in communications directed to members of Congress. The lower courts, in denying any remedy to Banks, relied heavily on this Court's criteria as expounded in Goldman, and thus construed Article 1149, Navy Regulations broadly, even extensively, while construing the conflicting 10 U.S.C. 1034 narrowly and ignoring 5 U.S.C. 2105(d). The Banks' case provides an excellent vehicle for a critical review of the Military Necessity Doctrine as expressed in Goldman.

We therefore respectfully urge that the Banks' Petition for Writ for Certiorari be granted.

Respectfully submitted,

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